Not a single member of the raiding party was asked if Michael or for that matter any one in the Honda Accord was inebriate or smelt of liquor at the time the Honda Accord was seized and the occupants detained. To my mind the story of Michael being drunk was invented to lend credence to the story that the accused went to collect the package at Michael's request because of the condition that Michael was in.

There was evidence that an informer was at the scene. That was the evidence of Roslan (PW10). And it was sought to show that the informer could have been Sei Chye Ming. According to Lance Corporal Roslan, on the day of the incident the informer was present before the arrest of the accused was made. He said that the informer handed to him the key to his (the informer's) motorcycle as the informer was afraid to take it back. He said he rode the motorcycle back to Klang that night after Inspector Ibrahim had sent him in a van alone to pick it and that on the way to Klang he saw the seized Honda Accord going also to Klang. He said he was riding without a helmet and his explanation for not taking the helmet from the informer was that he did not think to ask for it. He denied that he jump-started the motorcycle. And he denied he never met the informer. The question arises as to whether the informer parked his motorcycle at the market. The accused said he saw Sei Chye Ming alight from his motorcycle. None of the prosecution witnesses save for Shee and Roslan remembered any motorcycle in the case and my view is that they were not feigning when they said they had no knowledge of the motorcycle. Shee merely saw the motorcycle being ridden by Roslan on the way back to Klang. The accused insisted he brought the police to the scene and that he pointed out the motorcycle and that the motorcycle was started through the use of wires. Constable Shee was questioned about going back to the Chow Kit area where it was recovered. He was, however, not questioned about its recovery at the area of the arrest. He denied going to recover it.

Defence counsel's suggestion was that since a shot was fired by PC Chua at the car after the accused was arrested, Sei Chye Ming might have bolted and left his motorcycle there. But the evidence of Shee and Chua who kept observation on the accused just before the accused's arrest did not at all show that a man had just alighted from a motorcycle or that this man had inserted something in the accused's waistband and had signalled to the police after that. The accused was arrested on the road as attested to by both constables and not, as stated by the accused, when he was still in the market area and when he was himself assisting to insert the package into his waistband. Roslan may have lied about the informer to protect his identity but my view is that this informer was not Sei Chye Ming nor was he an agent provocateur who set the trap for the accused by giving the package of drugs to him.

I now come back to the scene of the arrest of the accused. The police officers identified themselves as they arrested him. The accused struggled. And he shouted, 'Robber! Robber!' He must have shouted as a reflex action because the policemen did identify themselves. And in fact the police again identified themselves as police officers. Yet he continued to struggle. Why? It seems to me that it was because he was aware he was carrying drugs. If the package contained money the money would have been in notes. But the package contained a granular substance and the package was tucked in at his waistband and he must have felt and known the package contained drugs and not money as he claimed he thought it contained.

Having considered the totality of the evidence I am of the view Sei Chye Ming or the person portrayed as him did not exist; and that the elaborate story of Michael and Sei Chye Ming and him staying the night in the hotel, of the quarrel between Michael and Sei Chye Ming over money owed, of the pre-arranged meeting between these two where Sei Chye Ming would hand over the money to Michael, of the pre-arranged meeting of the accused and Michael at Pertama Club for drinks, of Michael being drunk and Michael requesting the accused to collect the money for him from Sei Chye Ming, is sheer invention.

On the balance of probabilities I find that the accused knew the nature of the drug to be heroin and that he was trafficking in it.

Order accordingly.

Solicitors: *Lawrence, Dhillon & Associates.*

Reported by *Wong Kim Fatt*

Tan Ooi Chee & Anor v Kanching Realty Sdn Bhd

HIGH COURT (KUALA LUMPUR) – SUIT NO F356 OF 1985
SHANKAR J
28 MARCH 1988

Civil Procedure – Judgment in default of appearance – Application to set aside granted by senior assistant registrar – Appeal – Good reason to be shown why appearance was not entered in time – Whether there exists a defence on the merits

The plaintiffs entered into an agreement with the defendant for the purchase of a piece of property. The plaintiffs instituted a claim against the defendant for statutory damages for late possession and obtained a judgment in default of appearance. The defendant applied for the judgment to be set aside and the application was allowed by the senior assistant registrar. Against this decision, the plaintiffs appealed to the High Court.

Held, dismissing the plaintiffs' appeal:

(1) The principles upon which a default judgment is set aside are too well known. A good excuse has to be shown why appearance was not entered in time and there should be a defence on the merits.

(2) In this case, the defendant's director affirmed an affidavit to the effect that there are several companies having their registered office at the same address as the defendants' company. Consequently when the writ of summons arrived it was ignored because the defendant was then away on a business trip. As soon as he returned and discovered the writ he instructed his solicitors to enter an appearance. They did so but the plaintiffs' solicitors refused to accept the appearance and insisted on enforcing their rights under the default judgment.

(3) So far as merits are concerned, a draft statement of defence was filed. The defendant's contention was that possession was not given on time because the plaintiffs failed to pay the full purchase price and various other outstanding sums. When they did so they were handed the keys.

(4) Since the defendant has something to say, justice requires them to be given an opportunity of being heard before judgment was taken against them. The plaintiffs can be left to test their confidence in a subsequent application either for summary judgment or under O 18 r 19 of the Rules of the High Court 1980.

Case referred to

1 *SEA Housing Corporation Sdn Bhd* v *Lee Poh Choo* [1982] 2 MLJ 31 (refd)

J Fam for the plaintiffs/appellants.
Harpal Singh Grewal for the defendant/respondent.

Cur Adv Vult

Shankar J: The plaintiffs entered into an agreement with the defendant for the purchase of a land and house to be constructed thereon. The agreement was subject to the Housing Developers (Control and Licensing) Rules 1970 ('the Rules'). The defendant is a licensed housing developer. The claim was for statutory damages for late possession.

The plaintiffs' process server claims that service of the writ was effected on 31 May 1985. On 8 June 1985 the plaintiffs' solicitors entered a certificate of non-appearance and obtained a judgment in default of appearance. On 14 June 1985 the defendant's solicitors entered an appearance.

Shortly thereafter there was a re-allocation of this file from the Commercial Division to the Family and Property Division. This seems to have caused the defendant's solicitors some problems but the summons-in-chambers which they filed for the judgment in default of appearance to be set aside was eventually heard by the senior assistant registrar on 16 January 1986. The senior assistant registrar allowed the application and set aside the judgment. Against this decision the plaintiffs appealed to me.

I dismissed the application with costs to be taxed and paid by the plaintiffs in any event. My reasons for doing this are as follows.

The plaintiffs' contention is that they have an unanswerable case by virtue of the decision in *SEA Housing Corporation Sdn Bhd* v *Lee Poh Choo*.[1]

Whilst this may or may not be so, the real issue before me is not whether the plaintiffs have an 'unanswerable' case but whether the defendant should be given an opportunity of being heard before judgment is entered against them.

The principles upon which a default judgment is set aside are too well known to be rehearsed here. In short a good excuse has to be shown why appearance was not entered in time and there should also be merits.

In this case, the defendant's director affirmed an affidavit to the effect that there are several companies having their registered office at the same address as the defendant's company. Consequently when the writ of summons arrived it was ignored because the defendant was then away on a business trip. As soon as he returned and discovered the writ he instructed his solicitors to enter an appearance. They took action on 14 June 1985, ie within six days but the plaintiffs' solicitors refused to accept the appearance and insisted on enforcing their rights under the default judgment.

So far as merits are concerned a draft statement of defence was filed. The defendant's contention was that possession was not given on time because the plaintiffs failed to pay the full purchase price and various other outstanding sums. When they did so they were handed the keys.

Since the defendant has something to say for themselves I was of the view that justice requires them to be given an opportunity of being heard before judgment was taken against them. Obviously the senior assistant registrar thought likewise. So I dismissed the appeal. The plaintiffs can be left to test their confidence in a subsequent application either for summary judgment or under O 18 r 19.

The facts and the law in this case were similar to that in Civil Suit No 357 of 1985. The parties agreed that this decision should be binding on that case also.

Therefore I made a similar order in that suit as well. Obviously the two suits should be consolidated.

Appeal dismissed.

Solicitors: *AK Lee & Co*; *AJ Ariffin, Chong & Harpal.*

Reported by *Ng Sheau Jiuan*